

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KURT BOLDRIDGE)	
Claimant)	
VS.)	
)	
ATCHISON CASTING CORPORATION)	Docket No. 233,132
Respondent,)	
Self-Insured)	

ORDER

Claimant appealed the May 14, 1999 Award entered by Administrative Law Judge Bryce D. Benedict. The Appeals Board heard oral argument on September 21, 1999.

APPEARANCES

Patrick R. Nichols of Topeka, Kansas, appeared for the claimant. John B. Rathmel of Overland Park, Kansas, appeared for the respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The parties stipulated that claimant either sustained an accidental injury or developed an occupational disease while working in respondent's foundry from 1988 through approximately May 5, 1997.¹ The respondent conceded that claimant has an asthmatic condition and that the asthma was exacerbated by his work at the foundry. But the respondent contests that any exacerbation that was caused by claimant's work activities was only temporary in nature and did not cause either a permanent functional impairment or a permanent aggravation of the asthma.

¹ Regular hearing, p. 8.

Finding that claimant suffered only a temporary exacerbation of his asthma symptoms, Judge Benedict denied claimant's request for permanent partial disability benefits but ordered the payment of medical benefits for the expenses that claimant incurred before June 1, 1997.

Claimant contends Judge Benedict erred by failing to find that claimant's work in the foundry either caused or permanently worsened his asthma. Claimant contends he is entitled to receive a "100% award" because respondent allegedly failed to prove (1) that other work was available to claimant and (2) the weekly wage that claimant is now able to earn.

Conversely, the respondent contends the Award should be affirmed as claimant allegedly failed to prove that his asthma was either caused or permanently aggravated by working at the foundry. The respondent also contends that claimant's last injurious exposure occurred while claimant was working for another employer and, therefore, that employer should be responsible for any permanent partial disability benefits due claimant. Finally, in the alternative, the respondent argues that any permanent partial disability should be limited to the 20 percent functional impairment rating provided by Dr. Gerald Kerby.

The issues now before the Appeals Board are:

1. Did claimant's work in the foundry either cause or permanently aggravate his asthma or any other occupational disease?
2. If so, did the last day of injurious exposure occur while claimant was working for the respondent or some other employer?
3. What is the nature and extent of claimant's disability?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. Mr. Kurt Boldridge began working for the Atchison Casting Corporation, a foundry, in April 1988. The company melts scrap steel and makes steel castings for the military, railroads, and other companies.
2. Working in the foundry exposed Mr. Boldridge to visible clouds of black smoke, vapors, and dust. After working various jobs, in November 1993 Mr. Boldridge began working in quality control where he supervised workers reheating portions of molds to molten steel in order to remove molding material and to repair defects in the molds. In late 1993, Mr. Boldridge developed a lingering cough.

3. After treating for approximately one year with Dr. John Growney, who was both Mr. Boldridge's family physician and one of the company doctors, Mr. Boldridge requested a referral to a specialist. Dr. Growney referred Mr. Boldridge to Dr. Scott A. Lerner of Kansas City, Missouri. Mr. Boldridge began treating with Dr. Lerner in December 1995.

4. Despite his symptoms, Mr. Boldridge continued working at the foundry. And despite wearing a dust mask at work, Mr. Boldridge continued to experience problems breathing, which intermittently prevented him from working.

5. In April 1997, one of Dr. Lerner's partners, Dr. Bruce A. Schwartz, began treating Mr. Boldridge. After a flare-up of symptoms that Mr. Boldridge associated with work, in May 1997 Dr. Schwartz provided Mr. Boldridge with a peak flow meter. The results of that monitoring provided objective evidence that Mr. Boldridge's lung function decreased when he was at the foundry and increased when he was away from the foundry. On May 29, 1997, Dr. Schwartz wrote two letters – one to Dr. Growney and one "To Whom It May Concern" – both indicating that Mr. Boldridge's work at the foundry was adversely affecting his health. In the latter, the doctor wrote:

He works in a steel plant where there is a great deal of fumes and the workers are required to wear respirators. His work environment causes his asthma to worsen with resultant wheezing and coughing. We have also documented this with peak flows that decline during the work week [sic].

I have recommended to Mr. Boldridge that he work in a clean environment and that his current environment is hazardous to his health.

According to Mr. Boldridge, he took that letter to the foundry and asked for accommodated work, which the foundry either could not or would not provide. Mr. Boldridge's employment at the foundry then ended with his last day of work being sometime in May 1997.²

6. After leaving the foundry, Mr. Boldridge was unemployed until he began working for another employer, Nestle's. According to the February 4, 1999 report of vocational rehabilitation expert Monty Longacre, that employment lasted from May 29, 1998, to November 4, 1998. Although he was working in a clean environment at Nestle's, Mr. Boldridge quit that employer because it was becoming harder to keep his asthma under control due to the exertion and temperature changes that he encountered in that job. Based upon the expert medical testimony provided in this claim, the Nestle's job was not appropriate for Mr. Boldridge in light of his condition.

² The record is unclear regarding the last date worked. There is testimony that May 5, 1997, was the last day actually worked. But there is also evidence that May 19, 1997, was the last day actually worked.

7. Dr. Schwartz, who treated Mr. Boldridge through April 1998 and who is board certified in pulmonary medicine, testified that he believed that the foundry work clearly caused Mr. Boldridge's asthma. Additionally, the doctor also believes that Mr. Boldridge was exposed to a variety of stimuli at the foundry that caused a permanent worsening in his condition.

8. In October 1998, Dr. Thomas A. Beller, who is also board certified in pulmonary medicine and a clinical associate professor at the University of Missouri-Kansas City School of Medicine, evaluated Mr. Boldridge at his attorney's request. Dr. Beller diagnosed asthma and chronic bronchitis that he believed was caused by working at the foundry. After performing pulmonary function tests, the doctor rated Mr. Boldridge as having a 40 percent whole body functional impairment using the AMA Guides to the Evaluation of Permanent Impairment (AMA Guides) along with guides from the American Thoracic Society's Guidelines for the Evaluation of Impairment/Disability in Patients with Asthma.

9. In March 1999, Dr. Gerald R. Kerby, who is board certified in pulmonary medicine and a professor at the Kansas University School of Medicine, evaluated Mr. Boldridge at the foundry's request. Contrary to the opinions of both doctors Schwartz and Beller, Dr. Kerby testified that he believed Mr. Boldridge developed adult-onset asthma that had no relationship to the foundry. Additionally, the doctor testified that any symptom flare-ups that Mr. Boldridge experienced while working at the foundry were only temporary in nature and those flare-ups did not cause a permanent worsening of the asthma. Like Dr. Beller, Dr. Kerby used the AMA Guides and the American Thoracic Society's guides and rated Mr. Boldridge as having a 20 percent whole body functional impairment. According to Dr. Kerby, the ideal job for Mr. Boldridge is indoors, in a clean environment, and requiring only mild to moderate exertion.

10. Considering the entire record, the Appeals Board finds that Mr. Boldridge more probably than not developed asthma and chronic bronchitis as a result of working in the Atchison Casting Corporation's foundry. That finding is supported by doctors Schwartz's and Beller's opinions, which the Appeals Board finds persuasive, the positive correlation between the foundry environment and Mr. Boldridge's decreased lung function, and the fact that adult-onset asthma does not appear in Mr. Boldridge's family medical history. Further, Dr. Kerby did not fully understand Mr. Boldridge's job in quality control and his potential exposure to isocyanates, a substance generally accepted as an asthma-causing agent, when the steel molds were remelted to remove the molding material and residual resin compound from the castings.

11. Based upon the opinions of doctors Beller and Kerby, the Appeals Board finds that Mr. Boldridge's work at Nestle's only caused a temporary exacerbation of the asthma symptoms. Therefore, the last injurious exposure to the stimuli that caused the asthmatic condition and chronic bronchitis occurred at Atchison Casting Corporation.

12. According to the vocational rehabilitation expert hired by the foundry, Mr. Dick Santner, despite the occupational disease Mr. Boldridge retains the ability to earn somewhere between \$8 and \$12 per hour. Therefore, the Appeals Board finds that Mr. Boldridge retains the ability to earn \$400 per week. Comparing that wage to the \$672.07 average weekly wage that he was earning when he stopped working for the foundry, Mr. Boldridge has experienced a 40 percent loss of earning capacity as a direct result of the asthma and chronic bronchitis.

CONCLUSIONS OF LAW

1. Because the Appeals Board finds that it is more probably true than not that Mr. Boldridge's asthma and chronic bronchitis was caused by his work at the foundry, the Award should be reversed to grant Mr. Boldridge benefits for a 40 percent permanent partial general disability.

2. The Workers Compensation Act provides that workers with occupational diseases are to receive the same compensation as those workers that have been injured in accidents, except where it is specifically provided otherwise. The Act reads:

Where the employer and employee or workman are subject by law or election to the provisions of the workmen's compensation act, the disablement or death of an employee or workman resulting from an occupational disease as defined in this section shall be treated as the happening of an injury by accident, and the employee or workman or, in case of death, his dependents shall be entitled to compensation for such disablement or death resulting from an occupational disease, **in accordance with the provisions of the workmen's compensation act as in cases of injuries by accident** which are compensable thereunder, except as specifically provided otherwise for occupational diseases.³ (Emphasis added.)

Other than the statute quoted above, the only other statute in the occupational disease section of the Workers Compensation Act that deals with the amount of compensation that should be awarded for an occupational disease is the statute that gives the administrative law judge the power to cancel an award when a worker is later found to have the ability to earn the same or a higher wage than that being earned at the time of disablement.⁴

³ K.S.A. 44-5a01(a).

⁴ Slack v. Thies Development Corp., 11 Kan. App. 2d 204, 718 P.2d 310, *rev. denied* 239 Kan. 694 (1986).

(b) The administrative law judge may cancel the award and end the compensation if the administrative law judge finds that the employee:

(1) Has returned to work for the same employer in whose employ the employee was disabled or for another employer and is capable of earning the same or higher wages than the employee did at the time of the disablement, or is capable of gaining an income from any trade or employment which is equal to or greater than the wages the employee was earning at the time of the disablement;⁵

Similar language is found in the review and modification statute that relates to accidental injuries.⁶

3. In the recent Burton⁷ case, the Kansas Supreme Court approvingly cited Knight⁸ and Slack⁹ and, without analysis, stated that “disability” in occupational disease cases is measured by the loss of earning capacity. But those decisions were based on a disability formula different from the current disability formula.

The Knight decision was the first to require that disability for occupational disease be measured differently than disability for injury by accident. The Knight decision acknowledged that the statute, specifically K.S.A. 44-5a01(a), mandates that occupational disease be treated the same as injury by accident except as otherwise provided. The Court then looked to determine whether the measure of disability was otherwise provided in the occupational disease statutes. At that time, disability for injury by accident was based on loss of ability to perform work of the same type and character as the work the claimant was performing at the time of the accident.¹⁰ The Court noted that while the occupational disease statutes contain no separate measure of disability, those statutes suggest that, for occupational disease, the measure should be based on loss of ability to do work of any kind or character, not only the work the claimant was doing for respondent. This was, in part, because the occupational disease statute allowed the director to terminate benefits if the claimant returned to other work at a comparable wage. On this basis the Court

⁵ K.S.A. 44-5a04.

⁶ K.S.A. 44-528(b).

⁷ Burton v. Rockwell International, 266 Kan. 1, 967 P.2d 290 (1998).

⁸ Knight v. Hudiburg-Smith Chevrolet, Olds., Inc., 200 Kan. 205, 209, 435 P.2d 3 (1967).

⁹ Slack v. Thies Development Corp., 11 Kan. App. 2d 204, 718 P.2d 310, *rev. denied* 239 Kan. 694 (1986).

¹⁰ Puckett v. Minter Drilling Co., 196 Kan. 196, 410 P.2d 414 (1966).

concluded the measure of disability for occupational disease should be different than the measure of disability for injury by accident.

The current statutory scheme contains a different measure of disability for injury by accident and this fact raises questions about applicability of the Knight rationale. The current measure for injury by accident is not limited to the worker's ability to perform the work he/she was performing at the time of the accident.¹¹ It considers, for example, wage loss that factors in the worker's ability to earn a wage at employment in general.¹² The task loss factor is also not limited to the job the worker was performing at the time of the accident. In addition, the accidental injury statute also makes termination of benefits an option when the worker returns to work at a comparable wage.¹³ In this respect the accidental injury provisions are not significantly different than the occupational disease statute and provide no reason for measuring disability differently.

In light of the above, it is questionable whether Knight and Slack are still valid precedent and whether the Supreme Court would continue to limit the permanent partial disability in an occupational disease case to only the loss of earning capacity should it care to re-analyze the issue. Nevertheless, because Burton appears to be the most recent case in which the Kansas Supreme Court addressed the formula for determining permanent partial general disability for an occupational disease, the Appeals Board will follow that decision. Using only the loss of earning capacity as the appropriate standard for disability, the Appeals Board concludes that Mr. Boldridge's permanent partial general disability is 40 percent.

AWARD

WHEREFORE, the Appeals Board reverses the May 14, 1999 Award and grants Mr. Kurt Boldridge benefits for a 40 percent permanent partial general disability.

Kurt Boldridge is granted compensation from Atchison Casting Corporation for a May 5, 1997 occupational disease and resulting disability. Based upon an average weekly wage of \$672.07, Mr. Boldridge is entitled to receive 166 weeks of benefits at \$338 per week, or a total of \$56,108, for a 40 percent permanent partial general disability.

As of January 20, 2000, there is due and owing to the claimant 141.43 weeks of permanent partial general disability compensation at \$338 per week in the sum of \$47,803.34, which is ordered paid in one lump sum less any amounts previously paid.

¹¹ See K.S.A. 1996 Supp. 44-510e.

¹² Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

¹³ See K.S.A. 44-528.

Thereafter, the remaining balance of \$8,304.66 shall be paid at \$338 per week until further order of the Director.

Atchison Casting Corporation is also ordered to pay all outstanding and related medical expenses incurred by Mr. Boldridge for treatment of his asthma and chronic bronchitis conditions. Any issues regarding the reasonableness of those expenses may be presented for utilization review as provided by the Act and administrative regulations.

The Appeals Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Patrick R. Nichols, Topeka, KS
John B. Rathmel, Overland Park, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director